UNITED STATES OF AMERICA v. DAVID M. HICKS	)	**DEFENSE REPLY REGARDING MOTION TO DISMISS CHARGE 2 FOR FAILURE TO STATE AN OFFENSE TRIABLE BY MILITARY COMMISSION** **26 October 2004**

The Defense in the case of the *United States v. David M. Hicks* moves to dismiss Charge 2 on the ground that it fails to state an offense under the laws of armed conflict (LOAC), and states in support of this reply:

1. **Synopsis**: The prosecution's response fails to establish that LOAC protects combatants in the ordinary course of armed conflict. The killing of a combatant does not violate LOAC unless the killing involves unlawful means or methods.

2. **Facts**: Mr. Hicks never fired a weapon or assisted in firing a weapon at U.S. or any other force during the international armed conflict in Afghanistan.

3. **Discussion**: The issue at the heart of this motion is whether the killing of a soldier by an individual who does not posses combatant immunity violates the LOAC. The answer is no.

The prosecution's position is patently circular, since it attempts to validate the offense in Charge 2, listed in MCI No. 2, by citing MCI No. 2 itself as "declarative of existing law." But MCI No. 2 is not declarative of existing law regarding this particular offense. Instead, with respect to Charge 2, MCI No. 2 invents a new offense in its entirety. In fact, MCI No. 2 was issued after the alleged offenses occurred as a means of justifying prosecutions by this commission. MCI No.2 is not a duplicate of any of the International Criminal Courts statues, does not reflect the existing state of the law of war, and is not the product of independent or recognized scholarship on the LOAC or international law. Indeed, absent itself, MCI No. 2, and Charge 2 in particular, is without any foundation at all.

For this commission to have jurisdiction, the alleged criminal conduct must violate LOAC. The prosecution cites numerous examples in which the words "murder" or "killing" are used. Yet all of these examples involve the murder or killing of individuals protected under LOAC ("willful killing of protected person,"[1] "person taking no active part in hostilities,"[2] "acts committed against any civilian population,"[3] "willful killing of protected persons,"[4] and "attack

[1] Prosecution Response, page 7, paragraph (3)(c).

[2] Prosecution Response, page 7, paragraph (3)(c).

[3] Prosecution Response, page 8, paragraph (3)(d)(c).

[4] Prosecution Response, page 9, paragraph (3)(e)(i).

against any civilian population"[5]). In each of the instances cited by the prosecution, it is the *protected* status of the individual killed or attacked which renders such action a violation of the LOAC.

In contrast, in the circumstances pertinent here, military members are not within the LOAC's protection unless *hors de combat*. The LOAC does not serve as a complete criminal code governing all potential crimes that may occur within an international armed conflict. Rather, LOAC co-exists with domestic penal laws, and is selective in who, when and what it protects.

The prosecution reaches back to the Hague convention for the proposition that killing "**treacherously** individuals belonging to a hostile nation or army"[6] as support for this new charge. Yet, the prosecution fails to mention that the treacherous killing verbiage is designed to prohibit using poisons or acts of perfidy,[7] both of which are violations of LOAC.

Similarly, the prosecution's reliance on the international criminal tribunals of the ICTY, ICTR and ICC is misplaced. All the sections cited by the prosecution address killing of "protected persons" such as civilians or soldiers *hors de combat*. Thus, those sections do not support Charge 2 herein.

Further, the prosecution seeks support for Charge 2 in the definitions of "crimes against humanity." Again, that reliance is unavailing, since "crimes against humanity" are not triable in a military commission. Article 21 of the UCMJ extends jurisdiction over only violations of the law of war and specific statues. (Article 104 and Article 106 of the UCMJ).

Being an Unprivileged Belligerent is not an offense under LOAC

The prosecutions also unsuccessfully seeks refuge in MCI No. 2. The reference to "unprivileged belligerent"[8] in Charge 2 and in the comment in MCI No. 2, which states, "[e]ven an attack on a soldier would be a crime if the attacker did not enjoy 'belligerent privilege'" or "'combatant immunity[,]'" is an attempt to make any participation in an armed conflict by a person who does not enjoy combatant status a violation of the law of war. Such a position is incorrect.

There is but one LOAC consequence of direct participation in an armed conflict. Civilians who "take a direct part in hostilities" lose the protection from attack they would

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[5] Prosecution Response, page 9, paragraph (3)(e)(ii).

[6] Prosecution response, page 7, paragraph (3)(b).

[7] Perfidy is the misuse of protected status to accomplish a killing. (e.g. dressing as a member of the Red Cross to gain entry to an enemy's base and then attacking would be perfidy).

[8] The government uses the term "unprivileged belligerent" to represent an individual who is not entitled to combatant immunity. The test to determine a person's ability to receive combatant immunity is the same as determining the entitlement to POW status under the applicable principles of the Third Geneva Convention of 1949.

otherwise enjoy pursuant to the law of war.[9] Thus, it is not a violation of the law of war for combatants to use force against a civilian who takes a direct part in hostilities during the time they engage in hostile action: "[w]ith unlawful combatants, [LOAC] refrains from stigmatizing the acts as criminal. It merely takes off a mantle of immunity from the defendant, . . ."[10]

However, because the unprivileged belligerent does not have combatant status (he remains a civilian), he does not enjoy immunity from prosecution for murder that a combatant, protected by the law of war, has when killing an enemy combatant or civilian directly participating in the hostilities. This immunity from prosecution (together with entitlement to treatment as a prisoner of war) constitutes the fundamental benefit of lawful combatant status.

Absent such immunity, the unprivileged belligerent who kills a combatant is subject to prosecution for murder pursuant to the domestic law of those States that possess both subject matter jurisdiction over the offense, and personal jurisdiction over the accused. Because murder is not a crime under the LOAC, the applicable domestic law offers the sole basis for prosecution. Although the distinction between the war criminal and the unprivileged belligerent (who may also be a war criminal if his conduct violates LOAC) has at times been misconstrued,[11] such a distinction is well-established in the law of war, and is essential to a fair and impartial – and *lawful* – prosecution by this commission.[12]

4. Evidence: The testimony of expert witnesses.

5. Relief Requested: The defense requests that Charge 2 be dismissed.

6. The defense request oral argument on this motion.

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[9] PI, art 51.3.

[10] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, P.31 (2004).

[11] *See, e.g., Ex parte Quirin*, 317 US at 32. The Qurin decision has been criticized for its deviation from law of war principles by several top scholars and practitioners in the field. For instance, W. Hays Parks, the Law of War Chair, Office of the General Counsel, Department of Defense, has noted that "*Quirin* is lacking with respect to some of its law of war scholarship." *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2003), at fn. 31.

[12] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 234 (2004); Richard. R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs*, 1952 BRIT. Y.B. INT'L L. 323, *reprinted in* MIL. L. REV. (Bicentennial Issue) 487 (1975). *See also*, Derek Jinks, *The Declining Status of Pow Status*, 45 HARV. INT'L L.J. 367, 436-439, who takes an even more permissive view of the issue.

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